



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

April 14, 2016

Via electronic mail

[REDACTED]

Via electronic mail

Mr. Paul Prezioso
FOIA Officer
Illinois Gaming Board
106 North LaSalle, Suite 300
Chicago, Illinois 60601
Paul.Prezioso@igb.illinois.gov

RE: FOIA Request for Review – 2015 PAC 37779

Dear [REDACTED] and Mr. Prezioso:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2014)). For the reasons set forth below, the Public Access Bureau concludes that the Illinois Gaming Board (Board) improperly denied [REDACTED] August 18, 2015, FOIA request in its entirety.

On that date [REDACTED] submitted a FOIA request to the Board seeking a copy of the "completed investigative background employment packet and notes for [REDACTED] criteria not met by candidate [REDACTED] for not being selected for 1 of 3 Gaming Special Agent Trainee vacancies applied for"; [REDACTED] also specified that he was seeking the "[rationale] behind why an offer of employment was not offered to [REDACTED]"¹. On August 27, 2015, the Board denied the request in its entirety under sections

¹E-mail from [REDACTED] to Paul Prezioso, FOIA Officer, Illinois Gaming Board (August 18, 2015).

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7(1)(a), 7(1)(b), 7(1)(c), 7(1)(d)(v), and 7(1)(f) of FOIA (5 ILCS 140/7(1)(a), (1)(b), (1)(c), (1)(d)(v), and (1)(f) (West 2014), as amended by Public Act 99-298, effective August 6, 2015).

On October 13, 2015, our office forwarded a copy of the Request for Review to the Board and requested a detailed explanation of the legal and factual bases for the asserted exemptions as well as copies of the responsive records for our confidential review. On October 22, 2015, the Board submitted a written response to our office together with the responsive records for our review.

On October 28, 2015, our office forwarded a copy of the Board's response letter to [REDACTED]. On November 5, 2015, [REDACTED] replied to the Board's response letter. He contended that he was unfairly denied rightful employment, and the purposes of his request were to ensure information came from credible sources, that mitigating information was included, and to "verify if proper hiring procedures were followed."² [REDACTED] also asserted that privacy considerations were not relevant because he was requesting the records relating to his application, and, to the extent the Board wished to conceal the identity of those people who had negative things to say about him, it could redact those individuals' names and identifying characteristics.

DETERMINATION

All public records in the possession or custody of a public body are "presumed to be open to inspection or copying." 5 ILCS 140/1.2 (West 2014); *see also Southern Illinoisan v. Illinois Dept. of Public Health*, 218 Ill. 2d 390, 415 (2006). A public body "has the burden of proving by clear and convincing evidence" that a record is exempt from disclosure. 5 ILCS 140/1.2 (West 2014). The exemptions from disclosure are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois Univ.*, 176 Ill. 2d 401, 408 (1997). Under section 7(1) of FOIA (5 ILCS 140/7(1) (West 2014), as amended by Public Act 99-298, effective August 6, 2015):

[w]hen a request is made to inspect or copy a public record that contains information that is exempt from disclosure under this Section, but also contains information that is not exempt from disclosure, the public body may elect to redact the information that is exempt. ***The public body shall make the remaining information available for inspection and copying.*** (Emphasis added.)

²Letter from [REDACTED] to Paul Prezioso, FOIA Officer, Illinois Gaming Board, at 1-2 (November 5, 2015).

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Section 7(1)(a) of FOIA

Section 7(1)(a) of FOIA exempts from inspection and copying "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." The General Assembly "has authorized exemptions to the FOIA's expansive disclosure policy when a given disclosure is not just prohibited 'by federal or State law or rules and regulations adopted under federal or State law' but *specifically* so prohibited." (Emphasis in original.) *Better Gov't Ass'n v. Blagojevich*, 386 Ill. App. 3d 808, 814 (4th Dist. 2008).

The Board asserted that the investigatory evidentiary privilege recognized at Illinois common law allows it to withhold the records responsive to [REDACTED] request. However, the plain language of section 7(1)(a) of FOIA does not encompass common law, but rather that information specifically prohibited from being disclosed by federal or State statutes or rules. In addition, the case law cited by the Board, *Castro v. Brown's Chicken & Pasta, Inc.*, 314 Ill. App. 3d 542 (1st Dist. 2000) and *In re: Marriage of Daniels*, 240 Ill. App. 3d 314 (1st Dist. 1992) is inapposite. In both cases, the Appellate Court held that an evidentiary privilege in discovery relating to ongoing investigations could be construed as analogous to the existing exemptions in FOIA, not that the evidentiary privilege may be cited to withhold records under FOIA. See *Castro*, 314 Ill. App. 3d at 555; *Marriage of Daniels*, 240 Ill. App. 3d 325-26 & n.1. Indeed, FOIA recognizes seven exemptions to disclosure related to investigations contained in section 7(1)(d) of FOIA (5 ILCS 140/7(1)(d) (West 2014), as amended by Public Act 99-298, effective August 6, 2015), and the Board has also asserted one of those exemptions here. Accordingly, the Board has not demonstrated that these background investigation records are exempt in their entireties on the basis of section 7(1)(a) of FOIA.

Thirty-eight pages of the responsive records provided for our confidential review, however, appear to be print-outs from the Law Enforcement Agencies Data System (LEADS). Section 1240.80(d) of title 20 of the Administrative Code (20 Ill. Adm. Code §1240.80(d) (2016), last amended at 23 Ill. Reg. 7521, effective June 18, 1999) provides that "LEADS data shall not be disseminated to any individual or organization that is not legally authorized to have access to the information.",³ see also *Better Gov't Ass'n v. Zaruba*, 2014 IL App (2d) 140071, ¶27 (2014) ("The regulations make it clear that the public is not entitled to view or possess data that is transmitted through, received through, or stored in LEADS."). Accordingly, the Board may withhold any LEADS information under section 7(1)(a) of FOIA.

³That provision implements section 7 of the Illinois Criminal Identification Act (20 ILCS 2630/7 (West 2014)).

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Section 7(1)(c) of FOIA

Section 7(1)(c) of FOIA exempts from disclosure "[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, *unless the disclosure is consented to in writing by the individual subjects of the information.*" (Emphasis added.)

In its response to this office, the Board cited to our prior determinations that application materials and résumés of unsuccessful applicants to public positions are exempt under section 7(1)(c). However, because a subject of information may consent to the disclosure of that information, the rationale of those determinations does not apply when the requester is the subject of the information at issue. Although the Board has also asserted that the investigatory file contains other personal information exempt under section 7(1)(c), it has not described with any particularity what that information is. Accordingly, we conclude that the Board has not met its burden of demonstrating that the records are exempt from disclosure in their entireties pursuant to section 7(1)(c) of FOIA.⁴

Section 7(1)(d) of FOIA

Section 7(1)(d)(v) of FOIA exempts from disclosure records that are "created in the course of administrative enforcement proceedings and any law enforcement or correctional agency for law enforcement purposes," which "disclose unique or specialized investigative techniques other than those generally used and known * * * and disclosure would result in demonstrable harm to the agency or public body that is the recipient of the request[.]"

The Board asserted that it is a "law enforcement body with police powers" and that it conducted "a background investigation of [REDACTED] which included interviewing witnesses and former employers, obtaining employment and education files, running a criminal history check, reviewing court and police records, obtaining a credit history, and receiving drug test information."⁵ The Board also stated that "the background investigation conducted on [REDACTED] is substantially similar to the background investigation the Board conducts on its

⁴The Board also cited to section 7(1)(b) of FOIA as a basis to withhold "private information," but has not explained how in particular 7(1)(b) would serve as a basis to withhold the records in their entireties. As explained at the conclusion of this letter, we conclude that the Board may redact discrete portions of the responsive records under section 7(1)(b).

⁵Letter from Paul C. Prezioso, FOIA Officer, to Neil Olson, Assistant Attorney General, Public Access Bureau (October 22, 2015), at 2.

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licensees and applicants. The Board has an interest in maintaining the secrecy of the methods by which it conducts background investigations.⁶

The Board has not explained how its techniques are "unique or specialized investigative techniques other than those generally used and known" as required by section 7(1)(d)(v), and its assertion that its methods require "secrecy" is conclusory. The Board has generally described its background investigation techniques in its response to this office, such as interviewing references, reviewing employment and education files, performing criminal background checks, obtaining a credit history, and conducting a drug test. None of these aspects of the background investigation appear to be "unique" or "specialized." Accordingly, we conclude that the Board has not demonstrated that the investigatory records are exempt in their entireties under section 7(1)(d)(v).

The Board has also argued that "if [REDACTED] were to find out the sources of [derogatory] information it would run contrary to the public policy of safeguarding the privacy of persons interviewed during investigations."⁷ Section 7(1)(d)(iv) of FOIA (5 ILCS 140/7(1)(d)(iv) (West 2014), as amended by Public Act 99-298, effective August 6, 2015) exempts from disclosure information that would "unavoidably disclose the identity of a confidential source, confidential information furnished only by the confidential source, or persons who file complaints with or provide information to administrative, investigative, law enforcement, or penal agencies[.]" Witness statements may be withheld in their entireties under section 7(1)(d)(iv) if disclosure "would necessarily result in the disclosure of the identity of the source" of the information and, therefore, "redaction of the [records] cannot be meaningfully accomplished." *Copley Press, Inc., v. City of Springfield*, 266 Ill. App. 3d 421, 426 (4th Dist. 1994). We have reviewed the responsive records provided for our confidential review, and have determined that the identities of individuals who provided information to Board could be discerned from more detailed witness statements and other information even if the names of the individuals were redacted; the type of information at issue is generally contained in the "Additional Comments" section of reference reports and other portions of those reports that identify the prior relationship between [REDACTED] and the reference. However, the answers to the general "yes" or "no" questions asked of all references would not unavoidably disclose the identity of those individuals. Accordingly, although we have concluded that the Board has not met its burden of demonstrating that any of the records are exempt from disclosure under section

⁶Letter from Paul C. Prezioso, FOIA Officer, to Neil Olson, Assistant Attorney General, Public Access Bureau (October 22, 2015), at 2.

⁷Letter from Paul C. Prezioso, FOIA Officer, to Neil Olson, Assistant Attorney General, Public Access Bureau (October 22, 2015), at 2.

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7(1)(d)(v) of FOIA, the Board may redact portions of records containing detailed information that would unavoidably disclose the identity of witnesses under section 7(1)(d)(iv).

Section 7(1)(f) of FOIA

Section 7(1)(f) of FOIA exempts from disclosure "[p]reliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated, except that a specific record or relevant portion of a record shall not be exempt when the record is publicly cited and identified by the head of the public body." The section 7(1)(f) exemption is equivalent to the deliberative process exemption in the federal FOIA (5 U.S.C. §552(b)(5) (2012)), which applies to "inter- and intra-agency predecisional and deliberative material." *Harwood v. McDonough*, 344 Ill. App. 3d 242, 247 (1st Dist. 2003). The exemption is "intended to protect the communications process and encourage frank and open discussion among agency employees before a final decision is made." *Harwood*, 344 Ill. App. 3d at 248. That exemption "typically does not justify the withholding of purely factual material." *Enviro Tech Intern., Inc. v. United States Environmental Protection Agency*, 371 F.3d 370, 374 (7th Cir. 2004). "[T]he critical question is whether 'disclosure of the materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.'" *Chemical Weapons Working Group v. U.S. E.P.A.*, 185 F.R.D. 1, 3 (D.D.C. 1999) (quoting *Dudman Communications v. Department of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987)).

The records provided to our office for review contain memoranda in which Board employees express their opinions about [REDACTED] qualifications for employment and make hiring recommendations. These predecisional and deliberative materials fall within the scope of section 7(1)(f), and we have no evidence that the records or any part thereof were publicly cited or identified by the head of the public body. Accordingly, we conclude that the Board did not improperly withhold these opinion memoranda under section 7(1)(f) of FOIA. However, records that contain purely factual material, even if contained within an investigative report authored by a Board employee, are not exempt from disclosure under section 7(1)(f) of FOIA.

In accordance with the conclusions expressed in this letter, this office requests that the Board disclose copies of certain responsive records to [REDACTED] such as those containing purely factual information about his background, the reports of his interviews with Board employees, and application materials he submitted to the Board. As described above, the Board may withhold LEADS information, information identifying witnesses, and predecisional memoranda and any other records containing the opinions and recommendations of Board

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employees. In addition, the Board may properly redact "unique identifiers" that constitute "private information" under section 7(1)(b) of FOIA.⁸

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This correspondence serves to close the matter. If you have questions, you may contact me at (217) 782-9078 or nolson@atg.state.il.us.

Very truly yours,

[REDACTED]
NEIL P. OLSON
Assistant Attorney General
Public Access Bureau

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⁸FOIA defines "private information" as:

unique identifiers, including a person's social security number, driver's license number, employee identification number, biometric identifiers, personal financial information, passwords or other access codes, medical records, home or personal telephone numbers, and personal email addresses. Private information also includes home address and personal license plates, except as otherwise provided by law or when compiled without possibility of attribution to any person. 5 ILCS 140/2(c-5) (West 2014).